

Supreme Court, U. S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-821

LUCIUS HOLLOWAY, SR. and LAWRENCE GREENE, individually and on behalf of all others similarly situated; and the TERRELL COUNTY VOTERS LEAGUE,
Appellants,

v.

BETTY E. WISE, individually and in her official capacity as Judge of the Probate Court for Terrell County; WALTER (W. L.) STALLWORTH, WES (WILL O.) WESTON, HUGH LEE, RONALD FERGUSON, and COLIN (COLDEN) RAINEY, individually and in their official capacities as members of the Terrell County Board of Education; and RICHARD C. BARRY, individually and in his official capacity as the Terrell County School Superintendent,

Appellees.

Appeal from a Three-Judge Court in the United States
District Court for the Middle District of Georgia
Americus Division

**MOTION TO AFFIRM AND BRIEF ON
APPELLEES' MOTION TO AFFIRM**

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MOTION TO AFFIRM

Appellees, pursuant to Rule 16 (c) and (d) of the Rules of the Supreme Court of the United States, file this Motion to Affirm the Order entered on July 21, 1978, by the District Court, and contend:

1. That it is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument because under the decision of the United States Court of Appeals for the Fifth Circuit in *Pitts v. Busbee*, 511 F. 2d 126 (5th Cir. 1975) is controlling in the instant case.

2. That the question on which the decision of the case depends is now moot because the Order of the Three-Judge District Court dated July 21, 1978, has been activated and implemented in that: (a) the Grand Jury of the Superior Court of Terrell County, Georgia, was re-convened on September 5, 1978, and selected five (5) citizens of Terrell County to constitute the Terrell County Board of Education, who took office at 12 o'clock noon on the First Monday in October, 1978, and now constitute the de jure Terrell County Board of Education; and (b) that a special election to elect the Superintendent of Schools of Terrell County was held at the time of the general election on November 7, 1978, and such special election resulted in the election of a de jure School Superintendent of Terrell County, with the term of office to commence on January 1, 1979.

WHEREFORE, it is respectfully submitted that this Motion to Affirm be sustained, and that the Order of the Three-Judge Court dated July 21, 1978, be ordered to stand affirmed.

Respectfully submitted,

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Attorney for Appellees

INDEX

	Page
MOTION TO AFFIRM.....	i
TABLE OF AUTHORITIES	iv
BRIEF ON APPELLEES' MOTION TO AFFIRM	1
STATEMENT OF THE CASE	1
ARGUMENT	6
I. Review is Not Required Because the Ruling of the District Court and the Decision in <i>Pitts v. Busbee</i> , 511 F. 2d 126 (5th Cir. 1975), Upon Which the District Court Relied, is Not in Conflict with the Ruling in <i>City of Petersburg, Virginia v. United States</i> , 354 F. Supp. 1021 (D. D. C. 1972) (Three-Judge Court), Aff'd, 410 U.S. 962 (1973)	6
II. The Congressional Purpose of the Voting Rights Act of 1965 is Not in Conflict with the Decision of the District Court Resulting from the Objection Made by the Attorney General	8
III. The Decision of the District Court Based Upon the Objection of the Attorney General Does Not Impose, at the Present Time, Any Disruption of Local Elections Under the Voting Rights Act of 1965, for the Reason that the Issue that Determines the Instant Case is now Moot	9
CONCLUSION	11

CASES:	Page
Allen v. State Board of Elections, 393 U. S. 544, pp. 569-570 (1969), 22 L. Ed. 2d 1, 89 S. Ct. 817	4, 8
City of Petersburg, Virginia v. United States, 354 F. Supp. 1021 (D. D. C. 1972) (Three-Judge Court), Aff'd, 410 U. S. 962 (1973)	6, 7, 8
Georgia v. United States, 411 U. S. 526, 36 L. Ed. 2d 472, p. 483, 93 S. Ct. 1702	4, 8
Hagood v. Hamrick, 223 Ga. 600, 157 S. E. 2d 429 (1967)	10
Pitts v. Busbee, 511 F. 2d 126 (5th Cir. 1975) ...	ii, 6, 7, 8, 12
Tarpley v. Carr, 204 Ga. 721, 51 S. E. 2d 638 (1949) ...	10
United States of America v. The State of Georgia, et. al., Civ. No. 76-1531A (N. D. Ga.) aff'd (June 5, 1978) No. 77-1376	6
CONSTITUTIONAL PROVISIONS:	
Fifteenth Amendment	5
STATUTES:	
Georgia Annotated Code Section 2-5302	2
Georgia Annotated Code Section 2-5305	2
Georgia Annotated Code Section 32-902	2
Georgia Annotated Code Section 32-902.1	2
Georgia Annotated Code Section 32-903	2
Georgia Annotated Code Section 32-907	4
Georgia Annotated Code Section 32-1002	2
Georgia Laws 1965, p. 746	2, 4, 5, 8, 9
42 U. S. C., Section 1973c (Section 5 of the Voting Rights Act of 1965)	2, 4, 8, 9, 11, 12

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**BRIEF ON
APPELLEES' MOTION TO AFFIRM**

STATEMENT OF THE CASE

The 1945 Constitution of the State of Georgia provided:

(1) For the County Boards of Education to be composed of five (5) members selected by the Grand Jury of each County, and

(2) That the County School Superintendent of each County be elected by the voters concurrently with other County officers.

With the exception of a few changes that are not relevant to the instant case, these procedures were reenacted in the 1976 Constitution of the State of Georgia.

(*Section 2-5302 and Section 2-5305, Georgia Annotated Code*)

The general statutes as to the selection of the members of the Board of Education by the Grand Jury of each County is contained and set forth in *Sections 32-902 and 32-902.1 and 32-903* of the Georgia Annotated Code, and with the exception of the last sentence in *Code Section 32-903*, the remainder of the general statutes relating to the selection of the County Boards of Education were in force and effect prior to the effective date of the Voting Rights Act of 1965.

The County School Superintendent was elected by popular vote to serve for a term of four (4) years.

(*Section 32-1002, Georgia Annotated Code*)

These selection methods can only be changed by a Local Constitutional Amendment ratified by a referendum. A Local Constitutional Amendment was passed, which made a change for Terrell County under Georgia Laws 1965, p. 746, and which Local Amendment was submitted and approved at the General Election in November, 1968.

(Local Constitutional Amendment, Jurisdictional Statement, pp. 15a-21a)

The Local Constitutional Amendment resulted in certain changes as to Terrell County, consisting of:

(1) Membership of the Board of Education increased from five to seven members;

(2) That the Board of Education of Terrell County be composed of two members from the County at large, and one member from each of five specified Education Districts, making a total of seven Board members to be elected by the voters of the entire County, rather than to have five members appointed by the Grand Jury;

(3) That with the exception of the two members of the Board at large, that all others of the Board shall reside in the specified Education District, and that a system of staggered terms of office be in effect for all members of the Board;

(4) The members of the Board of Education to elect one of their number as the Chairman of the Board;

(5) A vacancy on the Board of Education, other than an expiration of the term of office, to be filled by the appointment by the remaining members of the Board, as opposed to appointment by the Grand Jury;

(6) That the Board of Education to be subject to all Constitutional and statutory provisions relative to County Boards of Education and to County Board members; and

(7) The Board of Education to elect the County School Superintendent, who serves at the pleasure of the Board, rather than to be elected by popular vote for a term of four years.

Appellants state that formerly the Chairman of the Board of Education was by appointment of the Grand

Jury. (Jurisdictional Statement, p. 7) This is not true, because formerly the Board of Education elected one of their number as President, to serve for the term for which he was chosen as a member of the Board of Education.

(Section 32-907, Georgia Annotated Code)

The Local Constitutional Act, (Georgia Laws 1965, p. 746) further provided that the Board of Education elect the County School Superintendent who would serve at the pleasure of the Board.

It is agreed that the election changes in Georgia Laws 1965, p. 746, were covered by Section 5 of the Voting Rights Act.¹ The Local Constitutional Amendment was voted upon and approved in a referendum in the General Election held in November, 1968, but the same was not submitted to the Attorney General of the United States as provided by Section 5 of the Voting Rights Act until July 28, 1977, even though the Amendment was put into effect on January 1, 1969. On December 16, 1977, Drew S. Days, III, Assistant Attorney General, Civil Division of the United States Depart-

¹ The portion of Section 5 of the Voting Rights Act essentially freezes the election laws of the covered States unless a declaratory judgment is obtained in the District Court for the District of Columbia holding that the proposed change is without discriminatory purpose or effect. The alternative procedure of submission to the Attorney General of the United States merely affords and gives a rapid method of rendering a new election law enforceable. *Georgia v. United States*, 411 U.S. 526, 36 L Ed 2d 472, 483, 93 S. Ct. 1702 (1973). Also, see *Allen v. State Board of Elections*, 393 U.S. 544, pp. 569-570 (1969), 22 L Ed 2d 1, 89 S. Ct. 817. The Constitutional Amendment was utilized without first having the approval of the Attorney General of the United States or without having been approved by the United District Court for the District of Columbia.

ment of Justice, in a signed letter objected only to that portion of the Local Constitutional Amendment, to wit:

"3. The method of election for the Board, including any practices or requirements of State law not previously followed or applied with respect to that Board."

(Jurisdictional Statement, pp. 22a-27a)

On July 21, 1978, the Three-Judge District Court ruled that the objection to a portion of the Constitutional Amendment constituted an objection to the entire Constitutional Amendment, and had the effect, under the Voting Rights Act, of preventing the Constitutional Amendment, in its entirety, from ever becoming effective. The District Court stated that no application had been made to the United States District Court for the District of Columbia for a Declaratory Judgment to approve the Amendment, and held that the Voting Rights Act had not been complied with, and further enforcement and use of the Constitutional Amendment (1965 Georgia Laws, p. 746) was enjoined.

(Jurisdictional Statement, pp. 1a-8a)

Appellees did contend in the District Court that if the Court did decide that the Local Constitutional Amendment was not divisible, then the whole Constitutional Amendment unenforceable and had no legal validity. (Appellees' Brief, p. 6) Appellees did submit to the District Court that if the Court did allow numbered posts or districts that did not violate the Fifteenth Amendment to the Constitution of the United States, an election could be held to elect the Board of Education members to operate the schools and to ap-

point a County School Superintendent. This position of the Appellees was suggested because of:

(1) The designated post requirement, and

(2) The majority vote position has been ruled upon in the case of the *United States of America v. The State of Georgia, et al.* in the United States District Court for the Northern District of Georgia, Atlanta Division, Civil Action No. C76-1531A. The Supreme Court of the United States, on June 5, 1978, affirmed this case from the Northern District of Georgia, Atlanta Division, being No. 77-1376.

(Reply Brief of Appellees, pp. 5-6)

ARGUMENT

THE QUESTION IS NOT SUBSTANTIAL

I. Review Is Not Required Because the Ruling of the District Court and the Decision in *Pitts v. Busbee*, 511 F.2d 126 (5th Cir. 1975), Upon Which the District Court Relied, Is Not in Conflict With the Ruling in *City of Petersburg, Virginia v. United States*, 354 F. Supp. 1021 (D.D.C. 1972) (Three-Judge Court), Aff'd, 410 U.S. 962 (1973).

The instant case relates to a County Board of Education, and the *Pitts* case relates to a Board of County Commissioners. The principle is identical in that in the *Pitts* case it was held by the Court that the objection by the Attorney General to one part of the statute rendered the whole statute unenforceable. In the instant case, the Attorney General objected to the method of election of the members of the Board of Education. The Board of Education in the instant case constituted the *foundation* of the entire Constitutional Amendment because without there being a de jure Board of Education, there could not be:

(1) Any persons who could operate and manage the public schools, and

(2) A method for the election of a de jure County School Superintendent.

The instant Constitutional Amendment was not divisible so that the parts of the Amendment that were not objected to by the Attorney General could still be viable for the reason that the *foundation* of the entire Constitutional Amendment is dependent upon there being a lawful Board of Education to act and carry out all of the parts of the Act which were not objected to. This is similar to the situation where the second floor of a building can not stand where the first floor is removed and taken from under the second floor.

The case of the *City of Petersburg, Virginia* is not the same as the instant case either as to the facts or as to the legal principles for the reason that this case was where there was an annexation of an area which contained approximately an additional 7,000 white persons that would eliminate a black population majority, and that the City of Petersburg, Virginia did not carry the burden of showing that such a change eliminating a black population majority, while retaining at large election for City Councilmen, did not have the purpose or the effect of denying or abridging the right to vote on account of race or color. Thus, it can be very clear that the case of the *City of Petersburg, Virginia* is definitely not in conflict with the *Pitts* case, nor is it in conflict with the instant case as decided by the District Court. The Court in the case of the *City of Petersburg, Virginia* suggested that there be made a shift from the at large method of election to a ward system of election of the City Councilmen, but this was only a suggestion

which had been made by the Attorney General. There is nothing in the case of the *City of Petersburg, Virginia* in conflict with either the *Pitts* case or the ruling by the District Court in the instant case.

II. The Congressional Purpose of the Voting Rights Act of 1965 Is Not in Conflict With the Decision of the District Court Resulting From the Objection Made by the Attorney General.

Section 5 of the Voting Rights Act essentially freezes the election laws unless a Declaratory Judgment is obtained in the District Court for the District of Columbia, holding that a proposed change is without discriminatory purpose or effect. The alternative procedure of submission to the Attorney General gives a rapid method of rendering a new election law enforceable.

(*Georgia v. United States*, 411 U. S. 526, 36 L Ed 2d 472, p. 483, 93 S. Ct. 1702; also, *Allen v. Board of Elections*, 393 U. S. 544, 22 L Ed 2d 1, 89 S. Ct. 817)

In the instant case in regards to the Local Constitutional Amendment, the Attorney General objected to that portion of Georgia Laws 1965, p. 746 relating to the method of election of the Board of Education. (Jurisdictional Statement, pp. 22a-27a) The objection was based upon the fact that the Attorney General was unable to conclude that the method of election for the Board of Education will not have a discriminatory effect. The objection of the Attorney General was to make the method of election for the Board of Education of Terrell County legally unenforceable. The Board of Education is the foundation of the entire Act, and if there can not be a legal Board of Education that can operate as a de jure Board, then the entire Local Con-

stitutional Act is not divisible and the whole Act is a nullity in its entirety. The other portions of Georgia Laws 1965, p. 746, that were not objected to would have no foundation upon which to stand and to be legally enforceable because the entire Act itself derived its viability from there being a legally enforceable Board of Education.

The cases holding that State and Local laws be amended to devise a ward system for Councilmanic elections have nothing *whatsoever* in common with the instant case. The portions of the Act which the Attorney General found no objections to can not have any life of any kind because of the absolute necessity of being dependent upon a legally enforceable Board of Education for Terrell County.

III. The Decision of the District Court Based Upon the Objection of the Attorney General Does Not Impose, at the Present Time, Any Disruption of Local Elections Under the Voting Rights Act of 1965, for the Reason That the Issue That Determines the Instant Case Is Now Moot.

The Order of the Three-Judge District Court, dated July 21, 1978, has been activated and implemented in that:

(1) The Grand Jury of the Superior Court of Terrell County, Georgia, was re-convened on September 5, 1978, and selected five (5) citizens of Terrell County to constitute the Terrell County Board of Education, who took office at 12 o'clock noon, on the First Monday in October, 1978, and now constitute the de jure Terrell County Board of Education; and

(2) A special election to elect the Superintendent of Schools of Terrell County was held at the time of the General Election on November 7, 1978, and such spe-

cial election resulted in the election of the de jure School Superintendent of Terrell County, with the term of office to commence on January 1, 1979.

The de jure Terrell County Board of Education who took office at 12 o'clock noon, on the First Monday in October, 1978, consists of five (5) members, to wit:

- (1) W. L. Stallworth (black)
- (2) Will O. Weston (black)
- (3) Hugh Lee (white)
- (4) Colden Rainey (white), and
- (5) Ronald Ferguson (white).

Richard C. Barry (white) was elected the Superintendent of Schools of Terrell County in the special election that was held at the time of the General Election on November 7, 1978, with the term of office to commence on January 1, 1979.

The previous members of the Terrell County Board of Education and the School Superintendent of Terrell County were each de facto public officers according to the Order of the District Court dated July 21, 1978, but at the present time, they are now de jure public officers.

(Jurisdictional Statement, pp. 5a-6a). (Also, *Hagood v. Hamrick*, 223 Ga. 600, 157 S. E. 2d 429 (1967), and *Tarpley v. Carr*, 204 Ga. 721, 51 S. E. 2d 638 (1949).

There would be a far more serious disruption of the public schools of Terrell County for the Court to now reverse the District Court, and order the appointment of the present new Board of Education and the election of the new County School Superintendent to be

null and void and of no validity, and that the District Court be required to allow the previous seven (7) members of the Board of Education and the previous County School Superintendent to be reinstated as the de jure officers upon condition of the Court creating a single-member District plan for use in the election of members of the Board of Education so as to cure the objection of the Attorney General which is what is desired by the Appellants.

There would be nothing to be more disrupting than for the Court to now reverse the District Court when the Order of the District Court dated July 21, 1978, has been activated and implemented. The question on which the decision of the case now depends is moot for the above reasons. It is difficult to imagine the enormous disruption that would result in the public schools of Terrell County if the Court were to reverse the Order of the District Court that the present members of the Board of Education of Terrell County and the present County School Superintendent for Terrell County who are in office under the laws of the State of Georgia that were in effect prior to the effective date of the Voting Rights Act of 1965. There could be no complaint as to this present method of appointment of the members of the Board of Education and the present election of the County School Superintendent.

CONCLUSION

It is submitted that the Motion to Affirm be sustained and that the Order of the Three-Judge Court dated July 21, 1978, be ordered to stand affirmed for the reasons of:

- (1) That it is manifest that the question on which the decision of the cause depends is so unsubstantial as not

to need further argument, the same having been decided in the decision of *Pitts v. Busbee*, 511 F 2d 126 (5th Cir. 1975);

(2) The Voting Rights Act of 1965 does not conflict with the decision of the District Court resulting from the objection made by the Attorney General to the Local Constitutional Amendment; and,

(3) That the question on which the decision of the case depends is now moot because the Order of the Three-Judge District Court dated July 21, 1978, has been activated and implemented.

Respectfully submitted,

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